No. 85-1384

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri, *Petitioners,*

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents.*

DR. LEE ROY BLACK; W. DAVID BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Resources for the State of Missouri *Petitioners,*

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents.*

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. The Appeals Court incorrectly applied the least restrictive alternative test to the Department of Corrections' regulation of inmate-to-inmate correspondence and erred in requiring the defendants to present evidence of a pattern of security concerns.

2. The Appeals Court incorrectly applied the least restrictive alternative test to the Missouri Department of Corrections' marriage rule and erred in requiring the defendants to present evidence of a pattern of security concerns.

3. The Trial Court's findings of facts were clearly erroneous in that they were insufficient to support the order of the court and proceeded from an erroneous conception of the applicable law.

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CITATIONS

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Statutes and Miscellaneous Citations

OPINIONS BELOW

The opinions of the lower courts regarding the issues before this Court are contained in the Appendix to the Petition for Certiorari. District Court opinion, *Safley, et al. v. Turner, et al.*, 81-0891-CV-W-6, 82-0072-CV-W-6 begins at A-19 of the Appendix and is also at 586 F.Supp. 589 (W.D. Mo. 1984). The Court of Appeals of Eighth Circuit opinion styled as *Safley, et al. v. Turner, et al.*, 84-1827, 84-2337 appears in the Appendix beginning at A-1 and also is located at 777 F.2d 1307 (8th Cir. 1985).

The opinion of the District Court on the merits is not subject to the certiorari review granted by this Court. However, the opinion of the trial court on the substantive issues of this litigation will assist the court in understanding the issues presented.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court decision declared the petitioners' regulations concerning correspondence and marriage unconstitutional pursuant to Title 42 U.S.C. § 1983. Pursuant to Title 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was filed within ninety (90) days of the entry of judgment, on or before February 17, 1986. The jurisdiction of the Supreme Court was invoked under Title 28 U.S.C. § 1254(1), and the Writ of Certiorari was granted on May 27, 1986.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

I. Introduction

The plaintiffs initiated this lawsuit by filing a complaint for damages in the United States District Court, Western District of Missouri. An attorney was appointed and later, after the District Court consolidated a damage action numbered 81-0891 and an injunctive action numbered 82-0022, the District Court permitted the respondents to amend their complaint on October 5, 1983 and be

certified as a class pursuant to Fed.R.Civ.P. 23(b)(2).[1] A trial, without jury, was held lasting for a five day period during February and March of 1984. On May 7, 1984, the District Court filed its "Memorandum, Opinion and Order". The District Court, the Honorable Howard F. Sachs presiding, held that the Missouri Division of Corrections and Human Resources' (hereafter referred to as the defendants) regulation which required inmates to provide prison officials with a compelling reason before permission would be given for an inmate's marriage was an unnecessary infringement upon the fundamental privacy interests of the marital relationship. *Safley v. Turner*, 586 F.Supp. 589, 594 (W.D. Mo. 1984). The District Court found that the prison officials had not borne their burden of proof. The District Court required the defendants to present a pattern of security or rehabilitative concerns which justified the regulation in light of the court's additional finding that there was a less restrictive alternative available in the form of "counseling" by the superintendent. *Id.* at 594. In a similar vein, the District Court found that defendants' regulations which did not permit correspondence between inmates in separate institutions inside and outside of the State of Missouri without the prior approval of the prisoner's classification team was an

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1. The class is made up of the following persons:

A. Persons who either are or may be confined to the Renz Correctional Center and who desire to correspond with inmates at other Missouri correctional facilities or persons outside of the Missouri Division of Corrections.

B. Persons who desire to correspond with inmates of any Missouri correctional institution whose correspondence with inmates of Missouri correctional institutions has been stopped or delayed for any reason other than an attempt to violate the extant rules of the Missouri Division of Corrections concerning correspondence.

C. Persons who desire to visit or marry inmates of Missouri correctional institutions and whose rights of correspondence, visitation, or marriage have been or will be violated by employees of the Missouri Division of Corrections.

infringement on the inmate's First Amendment rights as annunciated under *Procunier v. Martinez,* 416 U.S. 396, 413 (1974). *Safley v. Turner, supra,* 586 F.Supp. at 595. The District Court held that a less restrictive alternative which would require the prison officials to review each piece of correspondence between inmates was a security measure which was sufficient to protect the institution and its inhabitants from danger. *Id.* at 596.

Notice of appeal was filed by the defendants and briefs were submitted to the Court of Appeals for the Eighth Circuit.

In an opinion filed November 19, 1985, Court of Appeals affirmed that portion of the District Court order finding that the challenged marriage and correspondence regulations were inconsistent with constitutional prohibitions against interference with the First Amendment and the privacy rights implicit in the Fourteenth Amendment to the United States Constitution. *Safley v. Turner, supra,* 777 F.2d at 1316. The Appeals Court, in its discussion of the correspondence rule, affirmed the District Court's application of the standard of strict scrutiny announced by this Court in *Procunier v. Martinez, supra,* on the basis that First Amendment speech rights were directly implicated and ultimately were deprived by the enforcement of the regulations in the instant case. The Appeals Court based its affirmance of the District Court on an analysis that *Procunier v. Martinez, supra,* requires a strict scrutiny analysis whenever a regulation is not a "time, place or manner" regulation of First Amendment activity and is not inconsistent with the prisoner's status as a prisoner. *Safley v. Turner, supra,* 777 F.2d at 1310-1311. Seeming to rely on the Second Circuit analysis in *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1029-33 (2nd Cir. 1985), the Court below found that it was not demonstrated that the exchange of mail between inmates was "inherently" dangerous enough to merit the application of the rational relation test enunciated in *Jones v. N.C. Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977) and *Bell v. Wolfish,* 441 U.S. 520 (1979); *Safley v. Turner, supra,* 777 at 1311-1312.[2]

In a similar analysis, the Appeals Court found that the defendants' regulations governing the application by inmates for permission to be married were an unconstitutional infringement of fundamental privacy rights of inmates. As with its decision concerning the correspondence rule, the Circuit Court found that since marriage was a fundamental right and the regulation absolutely prohibited some inmates from getting married, a standard of "strict scrutiny" was the appropriate rule of law to apply to the facts of the case. The Circuit Court could not find any state interest important enough to sustain the defendants' regulation. *Id.* at 1314.

Defendants also argued to the Appeals Court that the findings of fact and conclusions of law proceeded from erroneous concept of the law, and therefore, not clearly erroneous under Federal Rules of Civil Procedure 52(a) because the District Court specifically did not find that there had been any pattern or practice of the alleged violations of the plaintiffs' constitutional rights. The Appeals Court affirmed the trial court's findings of fact.

II. Statement of Facts

Hereafter, the volumes of transcript of the trial court proceeding will be noted to as Vol. ....., Tr. .....; exhibits in the Joint Appendix will be noted as: Joint Appendix .....; and exhibits attached to the brief as App. .....

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2. The plaintiffs have taken exception to the defendants' use of the term "inherently dangerous". To clear up any confusion, the term is taken from the Circuit Court's reliance on the phrase "special danger *inherent* in concerted group activities by prisoners". *Safley v. Turner, supra,* 777 F.2d at 1311. This language seems to be a take off on the Second Circuit's use of "presumptively dangerous" in their analysis. See *Abdul Wali v. Coughlin, supra,* 754 F.2d at 1031. The defendants' term "inherently dangerous", it is believed, fairly represents both concepts.

The Renz Correctional Center, hereafter referred to as "Renz", is located in Cedar City, Missouri, and is what is commonly termed a "complex prison" because it contains both male and female inmates and inmates of varying security level offenders. The female inmates who are incarcerated at Renz are predominantly medium and maximum security level offenders (Vol. II, Tr. 70).[3] Inmate classifications such as medium and maximum security are arrived at after assessment of various objective factors, such as the crime the inmate committed, the number of years the inmate is sentenced, the propensity for violence associated with the crime, the inmate's history of escape and other violations while in a prison. Most of the male inmates who are housed at Renz are minimum security inmates (Vol. II, Tr. 70). Renz also serves a unique function as a location to "hide" inmates who need special protection from other prisoners in the Missouri Department of Corrections or some other state's department of corrections (Vol. II, Tr. 77-78; Vol. IV, Tr. 23-24).

Structurally, Renz has a minimum security perimeter without the added security elements such as guard towers or walls that other maximum security pisons would normally possess (Vol. II, Tr. 70; Vol. IV, Tr. 230). The other security institutions in the Missouri correctional system have varying differences in perimeters, population, security procedures and facilities all in accordance with their security and population levels (Vol. IV, Tr. 101, 230).

The Superintendent of Renz, William Turner, personally initiated most, if not all, of the educational, vocational and "substance abuse" programs that were in existence at Renz (Vol. II, Tr. 59-64). Since the greater number of female inmates come from home environments in which they had been abused, and that abuse played some part in

3. The medium and some maximum security level women are presently being moved to the Chillicothe Correctional Center in Chillicothe, Missouri.

their crime, these rehabilitation programs were intended to increase inmate skills and self-worth in the hopes of avoiding repetition of the conditions that led to the commission of the crime (Vol. I, Tr. 80-83).

Concurrent with the rehabilitative concerns of the officials at Renz are also the security concerns. As indicated before, Renz has a minimum security perimeter which housed both sexes and all security levels of inmates (Vol. II, Tr. 230). The advantages of this innovative combination of prisoners is the diverse mixing of various levels of rehabilitative attainment and a more lifelike recreation of civilian society within the prison (Vol. III, Tr. 147-150). The disadvantages are the mixture of security concerns among various security levels of inmates and volatile sexual related problems, such as rivalries between competing suitors (Vol. II, Tr. 72-73; Vol. III, Tr. 151). The development of this program at Renz has, unfortunately, been concurrent with the increasing incidents of prison gang violence within the Missouri prison system (Vol. III, Tr. 267; Vol. II, Tr. 75-79). Coincidentally, two weeks before the trial of this action, two inmates were killed in gang related violence at the Missouri State Penitentiary (Vol. III, Tr. 76).

Inmate-to-inmate correspondence at the time of the trial of this action was regulated by Divisional Regulation 20-118.010(e) (Joint Appendix 33). Correspondence was permitted between related inmates by the classification team at Renz (Vol. V, Tr. 50-51, Joint Appendix 39). To determine whether non-family inmates would be permitted to correspond with each other, the classification team considered whether the correspondence would be in the "best interest" of the inmate (Vol. IV, Tr. 259; Vol. V, Tr. 52-54, Joint Appendix 39). For this consideration, the classification team used psychological reports, conduct violations and progress reports contained in the inmate's file. Although these materials were not physically used on each oc-

casion, the classification team and members of the supervisory staff at Renz were familiar with the classification files of most of the inmates (Vol. IV, Tr. 258). In this manner, inmate-to-inmate correspondence was controlled by requiring the prior approval of the prison officials (Vol. IV, Tr. 258). It was not necessary to review each individual piece of mail once the caseworker, and/or the treatment team, were satisfied that they could trust an inmate (Vol. V, Tr. 49).

In daily operation, the correspondence policy was operated in a practical manner. Initially, when a letter arrived, or was being sent out of the institution, the return address or the forwarding address was reviewed by staff in the mail room. If a letter seemed to be suspicious in some manner, it was forwarded to the case supervisor (Vol. IV, Tr. 260-261; Vol. V, Tr. 48-54). The caseworker supervisor would then examine the letter to determine whether the mailing address or the return address indicated it was from a correctional facility (Vol. IV, Tr. 262). The supervisor would check his "approved" list to determine if the inmate who was either sending or receiving the letter had been approved for inmate-to-inmate correspondence (Vol. IV, Tr. 261; Vol. V, Tr. 48-49). If the supervisor was convinced that the letter was clearly suspicious (i.e., that it was an attempt to circumvent the correspondence rule), he opened the letter and scanned its contents (Vol. V, Tr. 46-47, 55-57). Inmate-to-inmate correspondence which merely had affixed on it the legend "legal", if unapproved, was opened and scanned for contraband, plots, or other illegal activities (Vol. V, Tr. 64-65, 68-69). If the materials contained within were legal in nature, the letter was usally permitted to go through and the inmate contacted and instructed to seek approval through the appropriate channels (Vol. V, Tr. 6). Correspondence from non-inmates, if determined to be attempts to surreptitiously circumvent the mail rule, was

returned to the non-inmate (Vol. V, Tr. 66-67). Other than the times when it was suspicious, mail between civilians and inmates was not reviewed (Vol. IV, Tr. 262).

Prior to December of 1983, the Department of Corrections had Rule 20-117.050, which outlined general guidelines to be used if inmates were preparing to get married (Joint Appendix 45). The regulation gave general outlines, which included that the prison would not assist inmates in their preparation to get married. Renz Correctional Institution had an institutional marriage rule, designated as 617.030, which stated in pertinent part, "all finalized plans will be submitted in writing to the institution head for approval" (Joint Appendix 50).

Subsequent to December 1, 1983, the Department of Corrections promulgated a new regulation, 20-117.050, which required inmates to provide the institution with a "compelling reason" to permit an inmate marriage while the inmate was incarcerated (Joint Appendix 47). The defendants understood that a "compelling reason" would be a reason which would be based on the existence and continuation of some prior relationship between the inmates, or that the inmates had a child in common (Vol. I, Tr. 215-216; Vol. IV, Tr. 30). Evidence was presented that marriages had been permitted and prohibited in the past, both at Renz and in other institutions, within the Missouri Department of Corrections. Inmate Nancy Row testified that she had requested to marry an inmate incarcerated at Renz (Vol. III, Tr. 283). Superintendent Turner did not permit the marriage between these inmates for a number of reasons. First, Superintendent Turner rejected the request because Ms. Row did not seem to have considered carefully her choice of a future husband (Vol. I, Tr. 76, 80-84). Also, Ms. Row had a lengthy sentence for her crime and was from an abused situation which contributed to her imprisonment for murder (Vol. I, Tr. 82). Superintendent Turner disapproved the marriage request

of Diane Finley because the superintendent could not determine which of the two men she named in her request was the man she desired to marry (Vol. I, Tr. 183-185). Finally, he considered the fact that inmate Finley had an escape on her record and did not know the crime for which one of her prospective husbands was incarcerated (Vol. I, Tr. 184-185). Another inmate, Judy Henderson, also requested permission to get married. In this case, the superintendent denied the request because she was in protective custody and could not identify any of her enemies (Vol. I, Tr. 177-181). Ms. Henderson's request for marriage was mooted when her "fiancee" was shot and killed while on escape (Vol. I, Tr. 182). Joyce Epley Roberts was told that she should not marry Orville Roberts because she did not know enough about him (Vol. III, Tr. 57-58). Superintendent Turner warned Ms. Roberts that association with her fiancee, a felon, could jeopardize her chances for parole (Vol. III, Tr. 63). Also, Ms. Roberts had trouble with another inmate suitor, and Superintendent Turner had helped her out of the previous entanglement (Vol. III, Tr. 67-69). Linda Thompson's marriage request was denied because she indicated to Mr. Turner that her federal parole officer would refuse to permit her to get married. Superintendent Turner did not feel he should permit her to do something that her federal parole officer would not (Vol. I, Tr. 175-176). The remaining applications of persons requesting to be married were not considered pending the outcome of the lawsuit (Vol. III, Tr. 49-50, 127).

SUMMARY OF THE ARGUMENT

I.

Correspondence Rule

The Court below attempted to limit this Court's analysis and the standards as applied in *Jones v. North Caro-*

lina Prisoners' Labor Union, Inc., supra, Bell v. Wolfish, supra, and *Pell v. Procunier, infra* (hereafter referred to as the rational relations test), to only those activities which were "inherently dangerous" and were "inconsistent with the fact of incarceration".

The lower court's analysis necessarily shifts the burden of proof from the inmates to prison officials, skews the theory and violates the spirit of this Court's analysis of inmates' rights in a prison setting. Fundamentally, it was error not to analyze the defendants' regulation, on the basis of whether the regulations were rationally related to legitimate penological goals. Once established that the regulations were rationally related to a proper penological goal, the burden should have shifted to the inmates to demonstrate that prison officials had substantially exaggerated their response to these concerns. *Bell v. Wolfish, supra,* 441 U.S. at 540-541, n. 23.

The challenged correspondence regulation in the case at bar does not censor the content of any particular type of speech, rather it fairly permits the speech in a particular manner and at a particular time. "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford,* 408 U.S. 104, 115-117 (1972). Defendants' regulation required the prior approval of inmate's correspondence with other inmates. The regulation was "content neutral" because, once a communication was approved between inmates, the correspondence was not censored or otherwise regulated. Although such a regulation may not be appropriate in the "free world", it is perfectly appropriate in the setting where prison officials are attempting to maintain internal security to protect inmates and staff and to promote the inmates' rehabilitation. This special relationship between the inmate and the prison official is not like the relation-

ship between a censor and a civilian. See *Pell v. Procunier*, 417 U.S. 817, 825-826 (1974).

The defendants take exception to the lower courts' assertion that correspondence between prisoners in an institution is not an "inherently dangerous" activity. Prisons, because of their structural identity and the complexion of their populations, differ from one another in a myriad of ways. The prison at issue in this case was a co-correctional institution housing maximum, medium and minimum security prisoners. The essence of the danger of group activity inside a prison is communication between, and the coordination of, inmate action. Group activites, such as a riot, a gang or revenge killing and escapes are just as serious, if not more serious, when the efforts are coordinated between one or more inmates. The primary tenet in the control of concerted group activity within a prison system is to break up the group or separate its leaders. Since communication between prisons is now permitted in the Missouri prison system, that solution is impossible.

II.

The Marriage Rule

In a similar manner, the court found both regulations regarding marriage promulgated by the defendants unconstitutional. The court held the marriage decision itself was a fundamental right, distinct "but equally as important" as, the decisions relating to other family matters. Again, the court found that the strict scrutiny test of *Procunier v. Martinez, supra,* was an appropriate test to be applied in this situation because the regulation was "not a time, place or manner" regulation, and because no alternative method of exercising the rights was available.

The court below made the same error as summarized in the correspondence argument regarding the burdens of proof and the "inherently dangerous" nature of the activity.

The Appeals Court did not recognize that inmate marriages, especially to another inmate, are usually not beneficial to the rehabilitative process and can be a threat to the security of an institution. Furthermore, there was evidence that the superintendent of the institution was concerned that the creation of "love triangles" would increase the danger of violent confrontation. This area is especially important since the Renz Correctional Center is a unique institution in Missouri. The regulation in effect after December 1, 1983 did not totally prohibit marriages between inmates, but it did make the inmate bear the burden of providing a "compelling reason" that the marriage would be of some benefit to him/her.

In the same sense as with the correspondence rule, the Circuit Court's analysis misapplies this Court's principles found in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra; Bell v. Wolfish, supra,* and *Pell v. Procunier, supra,* by relying on the stricter two-prong scrutiny test found in *Procunier v. Martinez, supra.* This reliance on *Procunier* skews the analysis and does not permit the appropriate guidance to state officials.

III.

Findings of Fact

Finally, it is the defendants' position that the Court below was clearly erroneous in that a number of the District Court's findings were not supported by evidence legally sufficient to substantiate the findings of facts. The defendants will also argue that the Court had an erroneous conception of the applicable law. The court repeatedly made findings of facts that amounted to, at worst, conclusions that might state a cause of action for damages, but were not sufficient findings upon which to base a department-wide injunction. Occasions, or instances, of certain conduct, even unconstitutional conduct, should not be the

basis for striking down department-wide regulations. At the very least, the District Court should be required to make a finding of a pattern or practice of unconstitutional behavior on the part of prison officials.

ARGUMENT

I.

The Appeals Court incorrectly applied the least restrictive alternative test to the Department of Corrections' regulation of inmate-to-inmate correspondence and erred in requiring the defendants to present evidence of a pattern of security concerns.

The Appeals Court affirmed the District Court decision that the Missouri Department of Corrections' regulation of inmate-to-inmate correspondence was not the least restrictive alternative and that the penological goals proposed by the defendants could be effectively dealt with by less restrictive means.

The Department of Corrections' regulation permitted correspondence between nonrelated prisoners only under certain circumstances. Regulation 20-118.010(e) set the following limits on correspondence between inmates.

> Correspondence from immediate family members who are inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/ treatment team of each inmate deems it in the best interest of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

J. Appendix 34.

In its decision, the lower court relied primarily on *Procunier v. Martinez,* 416 U.S. 396, 413 (1974), for its two-step analysis. The court reasoned that the correspondence policy of the defendants was not a "time, place

or manner" regulation of the First Amendment, but rather, was a total prohibition on the correspondence of those inmates who were not approved. They found that the First Amendment as it applied to inmate-to-inmate correspondence was a right not inconsistent with the fact of incarceration and that the proposed penological objectives proposed by the defendants were not legitimate. *Safley v. Turner,* 777 F.2d 1307, 1311 (8th Cir. 1985). The court distinguished this Court's decisions in *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977) and *Bell v. Wolfish,* 441 U.S. 520 (1979) by finding that First Amendment free speech rights were "barely implicated" in those cases and that those cases dealt with inmate activities which were "inherently" or "presumptively dangerous". *Safley v. Turner, supra,* 777 F.2d at 1311. The Circuit Court, in this analysis, seemed to be relying on the analysis of a Second Circuit case, *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1029-33 (2nd Cir. 1985). Because of this reliance, the defendants in this case will respond to the analysis used both by the Eighth Circuit in the present case and the Second Circuit in *Abdul Wali v. Coughlin, supra.*

The defendants submit that the Circuit Court erred because it used an incorrect legal standard and an incorrect analysis when it applied the least restrictive alternative test and failed to assess the appropriate burden of proof on the parties and, therefore, failed to give the appropriate deference to the regulations and to the discretion of the prison officials. The regulation and discretion of the prison officials should be judged on the basis of whether the regulation was rationally related to a legitimate penological goal. Once the prison officials have established that the regulation is rationally related to a proper penological goal, the burden then shifts to the prisoners to demonstrate that the correctional officials have substantially exaggerated their response to legitimate penological concerns.

The First Amendment's application in a prison environment has been universally recognized and widely and diversely interpreted. There is no doubt that prisoners have the reasonable right of correspondence with people outside the prison walls. *Procunier v. Martinez, supra,* 416 U.S. at 408. In *Procunier v. Martinez,* this court recognized that a regulation which permitted censorship of inmates' mail must further a substantial government interest, such as rehabilitation of the inmate or the maintenance of the security of an institution; but also, that such limitation should not be unnecessarily broad to achieve these objectives. Although providing a framework for the analysis of First Amendment claims regarding correspondence with the outside world, *Procunier v. Martinez* is not a case which reviewed the First Amendment guarantees of the constitution as they may be limited by the fact of incarceration. *Procunier v. Martinez, supra,* 416 U.S. at 408. When analyzed purely in terms of the right of inmates to exercise their First Amendment privileges within the confines of the prison, the First Amendment is necessarily more limited. *Pell v. Procunier,* 417 U.S. 817, 822 (1974). This Court, in *Martinez, supra,* and *Pell, supra,* permitted the exercise of First Amendment rights to the extent that the legitimate goals of the prison system were not compromised and paid considerable deference to the discretion of that the prison officials. In *Pell, supra,* there was no requirement the prison officials demonstrate that a less restrictive alternative was available which would effectuate the prison's legitimate objectives. In *Pell,* this Court noted:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State

> and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise."

Id. 417 U.S. at 825-826. *See also, Wolff v. McDonnell,* 418 U.S. 539, 575-576 (1974). In addition, a prisoner's First Amendment rights can be limited by the "operational realities of a prison" and the concept of incarceration. *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125-126 (1977); *Hudson v. Palmer,* 468 U.S. 517, 527-528 (1984). Further, in *Pell v. Procunier, supra,* and later in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra,* this Court modified the "least restrictive alternative test" when resolving issues involving the exercise of inmates' rights in a prison environment. *See* Robins, *Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration,* 71 J.Crim.Law & Criminology, 211, 215-216 (1980). In *Block v. Rutherford,* the Chief Justice specifically affirmed that, "administrative officials are not obliged to adopt the least restrictive means to meet their legitimate objectives." *Block v. Rutherford,* 468 U.S. 576, 596 n. 11 (1984); Accord, *Thorne v. Jones,* 765 F.2d 1270, 1275 n. 7 (5th Cir. 1985).

Subsequent to the *Jones* opinion, this Court in *Bell v. Wolfish,* 441 U.S. 520 (1979) noted:

> In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggeratedd their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

Id. at 540, n. 23; *see also, Hudson v. Palmer, supra,* 468 U.S. at 529-30.

The analysis the Circuit Court should have applied in the instant case was whether the correctional officials' regulation was rationally related to the legitimate goals of security, rehabilitation of inmates and the internal order of the institution. The term "rational" is not meant to mean that the choice made was necessarily the best measure which could have been applied in the situation. The term "rational" is meant to mean a measure that could be seen as reasonable in light of the legitimate penlogical goal. The defendants' witnesses testified that this regulation was intended to maintain the security and internal order of the various institutions within the Missouri Department of Corrections. To that end, the regulation was intended to control communications between prisoners at various institutions within the Missouri system. For example, the Superintendent at the Renz Correctional Center, Mr. Turner, believed that a disturbance at another prison within the Missouri system did not spread to the Renz Correctional Center because only those inmates who were approved to correspond were corresponding (Vol. II, Tr. 74). The correspondence rule had also assisted the superintendent in maintaining control over escapes at his minimum security institution. That problem of escape is exacerbated by the fact that Renz does not have the added security perimeter of a maximum security unit (Vol. II, Tr. 74-76). Also, and ever increasingly important within the Missouri prison system is the control of gangs (Vol. II, Tr. 76-77). Just two weeks before the trial of this matter, two inmates were killed in gang related violence (Vol. II, Tr. 76). In addition, Renz has the unique attribute of hiding inmates from other inmates within this system (Vol. II, Tr. 78). Mr. Turner testified that he felt there was no possible way that all the mail from each correctional institution could be read if free correspondence was permitted, thus opening the door for potentially dangerous mishaps (Vol. II, Tr. 119). The

regulation in effect at the time of the trial permitted the prison officials to approve the inmates who wanted to correspond rather than having to approve each separate piece of correspondence (Vol. II, Tr. 118, 119).

Sally Chandler Holder, the then Director of the Kansas Correctional Institution at Lansing which had been a co-correctional institution since 1980, testified that although Kansas had an open inmate correspondence policy, it was her opinion that they had problems with it (Vol. III, Tr. 158). In fact, it is her opinion that it contributed to an escape because the inmates were able to determine the shift assignments and that the institution was low on security (Vol. III, Tr. 158). Although Kansas has an open inmate-to-inmate correspondence policy, it has become apparent to the prison officials in Kansas that it is impossible to monitor all of the mail (Vol. III, Tr. 158). Although not mentioned by the District Court or the Circuit Court in their opinions, Kansas, at this point in time, does not have the kind of gang problem that Missouri is experiencing (Vol. III, Tr. 159-160). Ms. Holder also believes that monitoring mail is a poor allocation of staff time (Vol. III, Tr. 176).

Donald Wyrick, the then director of Adult Institutions for the Missouri Department of Corrections, testified that control of correspondence was considered important to the interception of escape plots, murders, murder plans and the control of the Aryan Brotherhood and other inmate gangs (Vol. IV, Tr. 225-228). Ellis McDougal, a Professor of Criminal Justice, felt that the correspondence policy was essential to the control of gangs as they infiltrated and progressed from California through various states' correctional systems (Vol. V, Tr. 13-14). Mr. McDougal was in favor of preventing correspondence between inmates except in limited situations (Vol. V, Tr. 19-20). He indicated that it was his estimate that only one quarter of inmate-to-inmate correspondence between non-relatives could be considered healthy (Vol. V, Tr. 22).

As this brief summary of the testimony in the case indicates, the choice to restrict correspondence to prior approval is an accepted prison practice and reasonable choice under the circumstances. It certainly is not the only choice, but given the fact of increasing gang violence, the personal experience of the prison officials, and the fact that Renz is a unique prison, it would seem that the decision is not irrational.

Further, the lower courts erred in applying the least restrictive alternative standard which necessitated that the state bear the burden of proving that there was a pattern of circumstances that threatened the security of the institution or that the same interest could not be accomplished in a less restrictive manner. This flies in the face of this Court's decision in *Jones* where this Court opined:

> Without a showing that these beliefs were unreasonable, it was error for the District Court to conclude that appellants needed to show more. In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order."

Jones v. N.C. Prisoners' Labor Union, Inc., supra, 433 U.S. at 127-128.

Defendants' witnesses presented evidence that they sincerely believed that there was a danger in not enforcing the correspondence policy. Prison officials do not have to present evidence of the unrelenting certainty of a danger to the security of the institution. Only that they sincerely believe that there is a present danger. On this point, the Eighth Circuit had previously opined:

> [Prison officials need] only to produce evidence that to permit the exercise of first amendment rights would create a potential danger to the institutional security . . . Once the state has met its burden going forward with the evidence, the courts must defer to the expert judgment of the prison officials unless the

> prisoner proves by "substantial evidence . . . that the officials have exaggerated their response" to security considerations. [Citations omitted.]

Otey v. Best, 680 F.2d 1231, 1233 (8th Cir. 1982), citing *St. Claire v. Cuyler,* 634 F.2d 109, 116 (3rd Cir. 1980).

The evaluation of the scope of the regulation must be done in light of the type of evidence the prison official can provide. If a challenged regulation is working, it is difficult, if not impossible, for prison officials to produce documentary evidence, or any evidence, of a tangible nature of what the problem would be if, in fact, the regulation was not in existence. This is probably the reason that this Court has been so clear in shifting the burden to the prisoner to prove that the officials have exaggerated their response. In *St. Claire v. Cuyler, supra,* the Third Circuit Court of Appeals specifically addressed the degree of evidence needed to demonstrate the reasonableness of the prison officials decisions. They noted, "This evidence may consist of expert testimony from responsible officials, provided they testify to opinions that are "held 'sincerely' and [are] arguably correct." *Id.* at 114.

The regulation which permitted the classification and treatment team to review the initiation of correspondence between inmates was intended to anticipate potential security problems and to enhance the individual's rehabilitation program (Vol. IV, Tr. 259-260). Although all treatment and classification teams base their decisions on similar regulations, their decisions naturally varied in light of the conditions of each individual institution (Vol. IV, Tr. 228-229). A maximum security institution, enclosed as the Missouri State Penitentiary is by high walls patrolled by many guards, may have the flexibility to permit more correspondence between inmates (Vol. IV, Tr. 230). At the opposite extreme, Renz, with such a diverse population and a relatively limited security perimeter, may well have a different view on the correspondence between in-

mates. A mistake in scanning the mail at Renz is not blunted by the extremely tight security measures as would a similar mistake at the Missouri State Penitentiary.

There was testimony at the trial that there had recently been two gang related murders and an overall increase in tensions within the prison system due to increased population. The only effective way of combatting prisor gangs or prison violence and other tensions is to anticipate violence between inmates. David Blackwell, the former director of Adult Institutions, testified:

> A. Well, historically correctional administrators have learned one of the cardinal rules in attempting to secure and keep secure a facility, that certain types of correspondence between inmates located in different institutions, or even in the same institution, once you learn of the nature, particularly the potential, negative potential of that correspondence, can be a true threat or grow to be a true threat to security.
>
> Q. Are there any specific areas?
>
> A. Well, for example, we go to great length to maintain a computer listing of enemies. In other words, you can enter an offender's name or number and the program is written such that it will produce what we have previously programmed as known enemies of that offender. And we use those lists in transfer consideration and in many other program security discussions.
>
> The intent of that is obvious. You don't want two people coming together who are known enemies in terms of an issue of protection of one or both. If you allow carte blanche correspondence, you've really negated that function and that effort. In other words, an inmate of one facility could correspond with another and describe a previous problem they have had with yet another inmate in that facility and give some instruction to seek out vengeance or in other ways retaliate.

Vol. III, Tr. 264-265. Later he testified concerning the gangs:

THE WITNESS: One particular area of concern that is not so new to some other states but is relatively new to Missouri is the development of gangs in institutions, and those are gangs that began together out of ethnic reason or purported religious similarities.

And in Missouri we've started to witness an increase in gang activity in the last 18 months. We have done some research and reading and attended conferences on gangs and ways to deal with those gangs. And the very first premise that is taught or considered in trying to dissuade gang organization and influence in the institution is through the gang members' communication.

That can be affected in several ways. One is by restricting correspondence. Another is by transferring gang members to different facilities so they can't communicate effectively or visit with one another; and that has proved to help us in the State of Missouri keep the gang activity, at least to date, at a reasonable level. And that has also been other state and federal bureau prisons' policy.

Vol. III, Tr. 266-267.

Mr. Blackwell also noted that volatile problems are initiated by increased communication between inmates competing for the affections of other inmates (Vol. III, Tr. 271).

In addition, pursuant to the Department of Corrections' duty to rehabilitate inmates, correspondence between male and female inmates, even between male inmates, is felt to be detrimental to the rehabilitation of inmates. See § 217.300-435, RSMo Supp. 1982. Pursuant to this goal, the Superintendent at the Renz Correctional Center established a wide range of educational, vocational and drug treatment programs for the improvement of inmates. These programs require that inmates develop a greater responsibility for themselves and necessitate that inmates develop some level of initiative (Vol. IV, Tr. 152). It was the

opinion of one of the expert witnesses that the maintenance or initiation of correspondence between male and female inmates and even correspondence between male inmates only reaffirms the negative influence that felons have on one another (Vol. IV, Tr. 17-19). This limitation is not different from the common, and supposedly constitutional, requirement that persons on probation and parole not associate with other felons.

Open-ended inmate correspondence means hundreds of new lines of communication between institutions which will beg for a misstep by an employee in reviewing and scanning literally thousands of pieces of mail. If a mistake is made, an inmate may suffer an injury. In the manipulative and hard world of prison society, inmates will have their rehabilitation retarded because instead of breaking relations with old inmate friends, they will have a new avenue to continue their felonious relationship and education. It is in such areas of practical concern that it is important for courts to defer to the expertise of prison officials.[4]

The Circuit Court, in affirming the district Court, relied quite heavily on *Abdul Wali v. Coughlin, supra,* to distinguish the defendants' argument that all rights are limited by the realities of incarceration. What the Circuit Courts in *Safley v. Turner* and *Abdul Wali v. Coughlin* seem to be deciding is that the two-prong standard announced in *Martinez, supra,* is only applicable to a prison environment only if an activity was not "inherently dangerous" or the challenged regulation was a "time, place or manner" restriction that permitted alternative avenues for the exercise of the right. *See Abdul Wali v. Coughlin, supra,* 754 F.2d at 1029-1032; *Safley v. Turner, supra,*

4. Indeed, the United States Court of Appeals for the Eighth Circuit has recognized the dangers of surrepititious correspondence between inmates, even to the level of acknowledging that the regulation of the secret correspondence is a "compelling interest". *Watts v. Brewer,* 588 F.2d 646, 650 n. 6 (8th Cir. 1978).

777 F.2d at 1310-1312. This naturally leads to the conclusion that if an activity is not "presumptively dangerous" or if the regulation does not permit an alternative means of exercising the right, the prison officials must then prove that their regulation is the least restrictive alternative available for the exercise of the right.

This analysis is fundamentally flawed because it cannot be applied without an appeals court deciding what is "inherently dangerous". The procedure recommended in *Abdul Wali v. Coughlin, supra,* and *Safley v. Turner, supra,* would necessitate a court assessing the relative dangerousness of activities within the prison walls and to assign a standard of review to each activity ranging from the least restrictive alternative analysis to the more lenient rational relations test. This *ad hoc* analysis is illustrated by the manner in which the courts in *Abdul Wali* and *Safley* distinguished each of the decisions by this Court with an assessment of the dangerousness of the respective inmate activity. This type of analysis would not only lead to inconsistency among the circuits, since each court would view certain inmate activities in a different light, it would also make the writing of prison regulations impossible. Since each prison is different in configuration and in the makeup of its population, prison officials would have to prepare regulations and predict whether or not the activity regulated would be considered dangerous enough to merit deference to their decision. In each situation the prison officials would be guessing whether the burden would be placed on them to prove that the regulation is the least restrictive alternative or whether the burden was to be placed on a prisoner because the activity was "pesumptively dangerous". *See, Abdul Wali v. Coughlin, supra,* 754 at 1031; *Safley v. Turner, supra,* 777 F.2d at 1312-1313.

The potential of divergence of opinion is illustrated by the Appeals Court's dismissal of the defendants' security concerns. The Appeals Court did not view communication between inmates as a dangerous activity. *See, Safley v.*

Turner, supra, 777 F.2d at 1311. Yet the coordination of inmate activity, whether it be by word of mouth or by letter, is easily the most feared of all inmate dangers. Dangerous acts, such as gang killings, riots or other demonstrations, require coordination which would be facilitated by communication among prisons. Inmate-to-inmate communication is an "inherently dangerous" activity just as this Court found inmate association to be in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra,* 433 U.S. at 129.

The Appeals Court's reliance on the "least restrictive alternative" is also not appropriate. As was noted by Justice White in *Regan v. Time, Inc.,* 468 U.S. 641 (1984), a less restrictive alternative analysis should not be used when analyzing a regulation which arguably regulates the "time, place and manner" of the exercise of a First Amendment right. *See, Regan v. Time, supra,* 468 U.S. at 657; *see also, Clark v. Community For Creative Non Violence,* 468 U.S. 288, 299 (1984).

The use of the "least restrictive alternative test" would also unfairly shift the burden of proof from the prisoners to the petitioner instead of having the prisoners shouldering the burden of proving by substantial evidence that prison officials exaggerated their response to the security considerations involved. If a regulation is performing as expected, it would be extremely difficult for prison officials to produce evidence of what bad results would occur if the regulation was found to be unconstitutional. A prison official just cannot produce bleeding bodies to demonstrate the effectiveness of their regulation. Even after the regulation is in place, mail scanners are going to miss the complex codes by which messages are passed from inmate to inmate in seemingly innocent correspondence. As has been pointed out repeatedly, prison officials have to be able to anticipate trouble; if they can only react to it, they will eventually fail to take appropriate measures. Such a failure will result in a tragedy

that will be far more serious than the accidental infringement of the notice requirements of *Procunier v. Martinez, supra.*

In the court below, the decision hinged on the fact that the correspondence policy was not a "time, place or manner regulation" and that thus the regulation unduly burdened the inmates' exercise of their First Amendment rights. The important aspect of such regulations is that they do not restrict the content of the speech and that they fairly permit the activity at a particular place and at a particular time. As it was noted by Justice Marshall in *Grayned v. City of Rockford,* 408 U.S. 104, 116-117 (1972):

> Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.* Our cases make clear that in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. (Citations omitted.) [Emphasis added.]

See also, Effron v. Intern. Soc. for Krishna Consciousness, 452 U.S. 640, 650-651 (1981).

Although prisoners do not lose all their rights when they are incarcerated, the fact of their incarceration limits the exercise of most of the rights non-inmates take for granted. *Jones v. North Carolina Prisoners' Union, Inc., supra,* 433 U.S. at 125-126. Voting, travel, religious observance, speech, marriage and communication are limited by the operational realities and the legitimate penological interests of the prison. This is not to propose that the analysis is limited merely to the type of individual involved, but is important to note who the individuals are, where they are located and what they are capable

of doing plays a substantial part in weighing the various factors to be assessed when applying a regulation which can justifiably restrict the exercise of a constitutional right. The regulation of communication between inmates in a prison setting may be the only way, short of a total 24-hour lock down such as the federal penitentiary in Marion, Illinois, is experiencing, of controlling prison violence.

Even applying the test of a "time, place and manner" regulation (i.e. that the regulation may not be based upon the content of the speech, that it serves a significant government interest and there are alternative channels for communication), this regulation could conceivably pass the test. *See, Regan v. Time, Inc.*, 468 U.S. at 648. The regulation did not censor the content of the speech between inmates. Once an inmate was approved, he was permitted to write concerning anything he wanted. The same can be said about the second requirement of the test. Certainly the control of prison violence and the maintenance of prison security is a substantial governmental interest. Finally, there are alternative avenues of communication for these inmates. This regulation did not prohibit all correspondence between inmates, it merely required that the inmate gain prior approval for the correspondence. Furthermore, and importantly, even under the strictest interpretation, the regulation only restricted communication between inmates. The press, civilians, inmates who have been released for more than six months and relatives of the inmates who are incarcerated were permitted to correspond with incarcerated inmates.

Finally, in this case the court relied on the belief that the prison officials could easily ensure the security of an institution by scanning each piece of mail. In a system that now numbers over 10,000 people, this means literally thousands of pieces of mail which need to be scanned. Not only does that beg for a misstep by an employee, a misstep which could not be uncovered until after the

mistake was made, but it is not an appropriate way of using limited resources. Instead of new guards and other staff in the prison system, Missouri now has mail monitors. It is possible that such an allocation of resources is a good idea, but the choice not to scan the mail should not be considered an unconstitutional choice. *See, Schlobohm v. U.S. Attorney General,* 479 F.Supp. 401, 403 (M.D. Pa. 1979). Many states permit correspondence between inmates and many states do not, such decisions are best to the judgment of the prison officials.

II.

The Appeals Court incorrectly applied the least restrictive alternative test to the Missouri Department of Corrections' marriage rule and erred in requiring the defendants to present evidence of a pattern of security concerns.

The United States District Court for the Western District of Missouri held that the Department of Corrections' restrictions on inmate marriages were unnecessarily broad and were unconstitutional because they infringed upon plaintiffs' right to marriage since they were far more restricted than was reasonable or essential for the protection of any state security interest, or any other legitimate interest. Citing *Bradbury v. Wainwright,* 718 F.2d 1538 (11th Cir. 1983); *Lockert v. Faulkner,* 574 F.Supp. 606 (N.D. Ind. 1983); *Salisbury v. List,* 501 F.Supp. 105 (D. Nev. 1980); *ABA Standard for Criminal Justice,* 23-8.6(a), (i) (2nd Ed. 1980).

The District Court applied the least restrictive alternative test since they noted that the defendants "had no right to have the last word in a personal decision of this importance." *Safley v. Turner,* 586 F.Supp. at 594-595. It was assumed by the Appeals Court that the Trial Court meant that there could be an alternative, and less restrictive, means for achieving the prisons' legitimate objectives of security and rehabilitation. *Id.* at 1313.

The defendants submit that the Appeals Court erred in its application of the legal standard of the least restrictive alternative test. Further, the court used the wrong legal standard in assessing the respective parties' burdens of proof and failed to assess the evidence and give the appropriate deference to the decisions made by the correctional officers in light of their legitimate security and rehabilitation concerns.

Until relatively recently, it had been assumed that a prisoner had no right to have a marriage ceremony performed in prison. *Johnson v. Rockefeller,* 365 F.Supp. 377, 380 (S.D. N.Y. 1973), *aff'd mem. sub nom., Butler v. Wilson,* 415 U.S. 953 (1974); *Polmaskitch v. U.S.,* 436 F.Supp. 527, 528 (W.D. Okla. 1977) (dicta); *Wool v. Hogan,* 505 F.Supp. 928 (D. Vt. 1981). Prohibitions against marriage while incarcerated have been upheld in reliance on a specific state statute prohibiting marriage between inmates. *Johnson v. Rockefeller, supra,* 365 F.Supp. at 380. Prison regulations published or unpublished have also been deemed a sufficient basis for, and an appropriate response to, the perceived pursuit of penological goals. *See, In Re: Golen,* 512 P.2d 1028, 1030 (Utah 1973), *cert. den'd,* 414 U.S. 1128 (1973); *Hudson v. Rhodes,* 579 F.2d 46 (6th Cir. 1978) (per curiam).

The fundamental right to marry while incarcerated is limited, and it is limited in the same manner that the exercise of other constitutional rights by inmates are limited. The Supreme Court in *Bell v. Wolfish,* 441 U.S. 520 (1979), noted:

> In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of the correctional officials, and, in absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such manners."

Id., 441 U.S. at 540, n. 23. Prisoners' rights can be limited by the mere fact of and concept of incarceration. *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125-126 (1977).

There is little reason to apply the "least restrictive alternative test" after the advent of *Jones v. North Carolina Prisoners' Labor Union, Inc., Id.* at 125; *Bell v. Wolfish, supra,* 441 U.S. at 541; *Block v. Rutherford,* 468 U.S. 576, 591, n. 11 (1984); *Otey v. Best,* 680 F.2d 1231, 1233 (8th Cir. 1982). The proper test is whether there is rational relation between legitimate penological interests and the prison's regulations. It is the plaintiffs' burden to prove by "substantial evidence" that the prison officials have exaggerated their response. *Otey v. Best, supra,* 680 F.2d at 1233.

The witnesses for the appellants presented evidence that the marriage regulation promulgated in December of 1982 was not an irrational attempt to achieve the proper and legitimate penological goals of security, rehabilitation and maintenance of internal order (see J. Appendix 47 for regulation). Superintendent Teurner testified that it was his opinion that some personal relationships between inmates, whether sexual or not, were detrimental to their rehabilitation (Vol. II, Tr. 66-67). This was based on the belief that women prisoners whose crimes were connected to abuse that they had suffered in their homes needed to concentrate on developing skills of self-reliance (Vol. I, Tr. 80-81). There was testimony from the former director of Adult Institutions and the then diector of Adult Institutions, Donald Wyrick, that marriages between inmates pose substantial security risks because of the increasing potential for escape and the increased risk of inmates taking advantage of other inmates (Vol. IV, Tr. 231-233, 32-33). The regulation was drafted not to prohibit marriages between inmates, but to shift the burden to the inmate to demonstrate that he or she was a safe

gamble. Further, the term "compelling interest" was understood to mean that there should be a mutual interest, such as a child, or prior relationship (Vol. IV, Tr. 20-22, 30).

Since there was evidence to demonstrate that these beliefs were reasonable, it was error for the court to shift the burden to the defendants to demonstrate justification or proof of some sort of a threatening pattern of inmate behavior which would justify the marriage rule. *Rogers v. Scurr*, 676 F.2d 1211, 1215 (8th Cir. 1982). In fact, the record provides little if any justification for the conclusion that the defendants exaggerated their response to marriages between inmates. The Department of Corrections, when it prepared and implemented this regulation, was not writing on an empty slate. Mr. Turner testified that he had considered other requests to be married. One such request involved Nancy Row. Nancy Row's request was denied because of a combination of factors (Vol. I, Tr. 78). Outside of the prison she had been abused by men. After reviewing her specific needs, the superintendent felt it was not in her best rehabilitative interests to be permitted to marry another inmate (Vol. I, Tr. 79-82). Turner testified that it was his duty to provide her with the skills of self-reliance, and he felt that his decision facilitated the achievement of that goal (Vol. I, Tr. 81, 177).

What the Court failed to understand in its assessment of Superintendent Turner's testimony is that he has a duty to rehabilitate prisoners. If the superintendent perceives certain activity which detrimentally affects the rehabilitation of an inmate, he should be permitted to prohibit or limit such activity. In Nancy Row's case, obviously, the denial assisted her in her rehabilitation. She testified that Mr. Turner has always treated her with respect and that she was now working in the control center with him (Vol. III, Tr. 49). She was aware that Mr. Turner was concerned that male inmates would promise female inmates things that the male inmates could

not provide (Vol. III, Tr. 44), but that he was attempting to assist the women at the institution to be "ready to go out into the community" (Vol. III, Tr. 48).

The decisions of Superintendent Turner have to be taken in the context of the prison setting. Joyce Epley Roberts testified that Superintendent Turner interfered with her attempts to marry another inmate at the Renz Correctional Center (Vol. III, Tr. 57-58). While alleging that Mr. Turner threatened her with the loss of her children, she later indicated that, at worst, she had suspicions that somebody at Renz may not have notified her of a hearing in the acrimonious custody fight between herself and her ex-husband (Vol. III, Tr. 70-72). Unfortunately, Mr. Turner had previously dealt with Ms. Roberts' desire to marry an ex-felon (Vol. III, Tr. 67-68). In that situation, she admitted that the previous suitor was a "gigolo" and attempted to obtain possession of money and her car from her and that Mr. Turner saved her from making a terrible mistake (Vol. III, Tr. 68). In fact, this ex-felon returned to the prison for thirty-one consecutive days in an unsuccessful attempt to see Ms. Roberts (Vol. III, Tr. 67).

Diana Finley had repeatedly asked to marry various inmates and seemed to have a remarkable lack of knowledge about the criminal records of her inmate suitors (Vol. I, Tr. 183-182, 186; Vol. IV, Tr. 218). There was also testimony that Ms. Finley and her latest suitor, Mr. Quillum, both had separate escapes on their records. Further, as the stipulation in the record indicates, she provided the superintendent with incorrect and possibly fraudulent information concerning the identity of the person she wanted to marry (Vol. IV, Tr. 219-220).

P. J. Watson/Safley was not permitted to marry the named plaintiff because she had herself asked that Len Safley leave her alone and threatened him (Vol. IV, Tr. 252-254). It was only after the filing of the lawsuit that

there seemed to be any change in sentiment (Vol. II, Tr. 47, 49). Unfortunately, in a situation where there has been a violent threat, or a perceived violent threat, a superintendent is not free to gamble on changes of heart when handling violent inmates.

Finally, Judy Henderson was denied permission to marry on the basis that she had requested "protective custody" and because she could not identify her enemies. She had confided in Mr. Turner that she feared for her safety because she was scheduled to testify in the criminal trial of her co-defendant in Springfield, Missouri. Superintendent Turner was concerned that such a sudden blossoming relationship between Ms. Henderson and her proposed husband was a possible indication of some danger (Vol. I, Tr. 178-179). It should be noted that her proposed husband was later killed while on escape from the Department of Corrections (Vol. I, Tr. 182).

The errors of the lower courts are best summed up by their assumption that inmates should be permitted to "make their own mistakes". *Safley v. Turner, supra*, 586 F.Supp. at 595. In some ways, that goes to the heart of the problem in the case before this Court. It is the defendants' contention that inmates should not be permitted to make mistakes while incarcerated within the Department of Corrections. These mistakes affect the security, the orderly maintenance of the institution, and they may also affect the results of the petitioners' attempts to rehabilitate the inmates. It is in protecting women inmates from "gigolos" that Superintendent Turner hopes to better prepare them to function in the outside world. It is easy, in retrospect, to question the judgment of Mr. Turner that Judy Henderson was in danger when his instincts told him that her relationship with the male inmate had developed too fast; or that P. J. Watson had had a sudden change of heart and decided that Leonard Safley was her long lost love. It is also inappropriate. Superintendent Turner is vested with the responsibility

of protecting inmates from each other and if he is wrong in his suspicion that one inmate is in danger from another, he can only say that he performed his duty in good faith. However, if he is wrong and that inmate is injured, he then suffers the liability. Judy Henderson's proposed suitor was killed while on escape from the Division of Corrections. Diane Finley testified that she provided the superintendent with incorrect information and had an escape to her credit. Len Safley used the alias "Jack King" to circumvent the mail rule. Superintendents of prisons have to deal, to the best of their ability, with a class of people who are under their care because the people have committed major mistakes. A superintendent cannot always trust the prisoners' word, their judgment of themselves, or of others. The regulation at issue permitted Superintendent Turner to assess by analysis of his staff's reports based upon the staff's knowledge of the inmates' judgment and maturity. As one of the defendants' experts testified, women inmates suffer from different types of problems compared to male inmates. Those different problems have contributed to the women inmates' criminal behavior. Too often they were overly dependent on males (Vol. III, Tr. 154-155). She testified that inmate-to-inmate marriages are detrimental to any sort of rehabilitative effort for an inmate:

> A. That would even be worse than allowing someone to marry someone from the outside because at least then you would have one partner who is out in society and who is not involved in an inmate situation.
>
> I think you have to understand that life inside an institution is not the same as life on the outside. They are not the same. And just for example, we've had lots and lots of inmates who left the institution, males as well as females, who thought they were in love forever; and it doesn't take very long on the street before this relationship has broken down and no longer exists. We have found that most of the relationships do not exist beyond one leaving the institution.

> Q. What effects does an inmate-to-inmate marriage have on inmate rehabilitation in your opinion?
>
> A. Oh, I think you would just put up a big stumbling block. I think you would make our job far more difficult. I think that would also be an administrative nightmare to try to deal with inmate-to-inmate marriages and inmate-to-inmate divorces which, of course, would follow from that.

Vol. III, Tr. 156-157.

In addition to the rehabilitation problems involved there are the security problems. It should be noted that the "gigolo" attempted to visit Joyce Epley Roberts for thirty-one consecutive days. The suitor's rising frustration and the need for the superintendent to monitor that situation is an indication of the kinds of security problems one confronts when supervising a prison. Sally Chandler Halford testified concerning problems she has with jealousies which develop between inmates who have a common object of affection. She testified that she had to lock up one woman prisoner every time her ex-offender, ex-husband visited his new wife (Vol. III, Tr. 163). If Leonard Safley had not been transferred from Renz after the threat against his life and later had been assaulted, would any court accept the defense that Mr. Turner had only thought of the affair as a "lovers' quarrel" (Vol. IV, Tr. 252, 253). See also, *Safley v. Turner, supra,* 589 F.Supp. at 593. Correctional personnel have to anticipate danger rather than merely react to it. The regulation permitted them that critical edge.

The lower courts substantially relied on the cases of *Zablocki v. Redhail,* 434 U.S. 374 (1978), and *Bradbury v. Wainwright,* 718 F.2d 1538 (7th Cir. 1983). In *Zablocki v. Redhail,* this Court invalidated, pursuant to the Equal Protection Clause, a state statute which did not permit a person to marry if he or she had not satisfied their financial obligation to their child. *Zablocki v. Redhail,* 434 U.S. at 377-378. The majority opinion, writtten by Justice

Marshall, found that the decision to marry was a fundamental right. *Id.* at 386. The decision seemed to turn on the basis that all the atttributes of married life were protected by the right to privacy, and thus, it was illogical not to protect the decision itself. *Id.* at 385-387.[5] Although the decision struck down the Wisconsin statute, the Court was acknowledged repeatedly that the states have traditionally had a substantial ability to regulate the rights and incidences of marriage. *Id.* at 386. *See Sonsa v. Iowa,* 419 U.S. 393, 404 (1975). See also, *Zablocki v. Redhail, supra,* 434 U.S. at 392-393 (Stewart concurring). The substantial problem with both lower courts' analysis in this case is that they relied on *Zablocki v. Redhail's* holding that the decision to marry was a fundamental right and then applied the least restrictive alternative test without also applying the appropriate analysis of whether the right could be limited by the fact of incarceration. Fundamental rights are limited because a person is in prison. As testimony indicated, the decision to get married causes substantial problems to prison security, the maintenance of internal security and adversely affects the rehabilitation of inmates. Especially with inmate-to-inmate marriages, the regulation requires only that the inmate demonstrate a compelling reason to be married. In effect, the plaintiffs are arguing that the fact that marriage is a fundamental right forecloses the state's right to regulate the prerequisites of marriage. States routinely deny prospective applicants for marriage licenses in the interest of age, degree of familial relationship, health, requirements of state residency, sexual preference and sometimes even budgetary limitations. *Sonsa v. Iowa,* 419 U.S.

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5. Concurring with the court's decision, Justice Powell and Justice Stewart writing in separate opinions, found the Due Process clause as more appropriate vehicle for striking down the statute. *Id.* at 391-403. It is assumed that the courts below found the regulation in the present case to be invalid because it violated the protections of the Due Process clause rather than the Equal Protection Clause.

at 406-407. The prison officials should have no less discretion to regulate inmate-to-inmate marriage because of the fact that inmate-to-inmate marriages have a shorter duration and that inmate marriages can be "cover" for illegal activities. All these facts support the discretion of the administrator as long as the inmate is incarcerated in the system.

Nor did the courts below apply *Bradbury v. Wainwright*, 718 F.2d 1538 (11th Cir. 1983) correctly. The plaintiffs would submit that the court did not consider any of the unrebutted evidence indicating that inmate-to-inmate marriages detrimentally effect the defendants' legitimate penological goals (Vol. II, Tr. 59-63). Even under the standard in *Bradbury v. Wainwright, supra*, the regulation could have been upheld. *Id.* at 1544-45. The court did not find any bad faith on the part of the appellants; at worst, it found them guilty of paternalism. *Safley v. Turner, supra*, 598 F.Supp. at 592, 597. Such findings indicate that the judge disapproved of the judgment of the appellants, but not of their intent. Further, the court ignored the evidence of the rehabilitative efforts of the appellants (Vol. II, Tr. 59-60).[6]

The plaintiffs have made much of the fact that the term "compelling interest" was not defined in the regulation. However, it was defined and understood to mean basically some sort of prior relationship between the inmates or that the couple had had a child as a result of their union (Vol. III, Tr. 152-155; Vol. IV, Tr. 20-21). Although there were some differences in syntax and explanation, the witnesses described the same fundamental

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6. The defendants submit that *Lockert v. Faulkner*, 574 F.Supp. 606 (N.D. Ind. 1983); *Salisbury v. List*, 501 F.Supp. 105 (D. Nev. 1980), have substantially the same weaknesses. In those cases, the courts never reviewed the exercise of the right in light of a prison forum. More to the point is the case of *Wool v. Hogan*, 505 F.Supp. 928, 932 (D. Vt. 1981). As noted by that court, the right of the formal ceremony, standing alone, should not be an unlimited right. *Id.* at 932.

interpretations of the regulations (Vol. I, Tr. 215-217; Vol. IV, Tr. 24, 30-37). The plaintiffs have argued that it is not rational to assume that the marriage of two inmates who meet in prison creates a greater security risk than does the marriage of two inmates who lived together before they were incarcerated. Actually, the plaintiffs have a point in the sense that marriage between inmates in prison, from the inmates' own testimony, is very seldom a good idea (Vol. III, Tr. 156). Whether the inmates met before or during their incarceration is not relevant to the risks imposed by the marriage itself. If it was not for some sort of relationship or other compelling reason, prison authorities probably would not approve, wholesale, marriages between inmates (Vol. III, Tr. 152-155; Vol. IV, Tr. 20-21). As has been noted by the authorities, in the "unreal world" of prison society, inmates have bad effects upon each other (Vol. III, Tr. 156; Vol. IV, Tr. 34). The regulation was an attempt to break up that sort of education, to avoid the love triangles and to prevent the use of one inmate by another (Vol. III, Tr. 155). Since the institution has a minimum security perimeter, the officials at Renz are always afraid of the unexpected (Vol. IV, Tr. 228-229). The plaintiffs in this case put themselves in prison by making some very bad life choices (Vol. III, Tr. 154). It is ironic that the district court found that it was appropriate to ban visits of former inmates based on evidence that such a ban tends to break up criminal association, yet will not let officials stop the same association through marriage.

Finally, the marriage issue has a different twist when compared to the correspondence issue. In *Procunier v. Martinez, supra*, this Court found that the infringement on the rights of civilians who had committed no crimes shifted the balance toward the protection of their first amendment right even though there may have been some security concerns involved. In the first argument, the defendants have argued that the security concerns are differ-

ent when dealing with two incarcerated felons. In the present argument, the regulation affected both inmate-to-inmate marriages and civilian-to-inmate marriages. Although there was testimony at the trial that some of the prison officials believe that the marriages between civilians and inmates were not necessarily a bad idea, the December 1983 regulation has to be interpreted as also regulating marriages between civilians and inmates. The troubling aspect about such a regulation is that it is within its reach to affect civilian prospective spouses with the result that the regulation seems to violate the spirit of *Procunier v. Martinez, supra.* These concerns could be laid to rest with the acknowledgment that the dangers of physical contact inherent in the association of inmates and their visitors is greater than the dangers surrounding inmate-to-civilian correspondence. This factual situation is similar to that of inmates who do not have a constitutional right to have contact visitation and/or interviews with the media even though civilian rights are implicated in those situations. *Pell v. Procunier,* 417 U.S. at 827; *Block v. Rutherford,* 468 U.S. at 588-589. In each one of those cases, this Court carefully weighed the penological justification for the regulations and found that the means were rationally related to the goals. The same can be done in the present case.

III.

The Trial Court's findings of facts were clearly erroneous in that they were insufficient to support the order of the court and proceeded from an erroneous conception of the applicable law.

In the present case, the trial court ordered that the parties confer and prepare a suitable consent decree in accordance with the opinion of the court. *Safley v. Turner, supra,* 586 F.Supp. 587, 597 (W.D. Mo. 1984). This was done, and the regulations which appear in the Joint Appendix are the result of the court order. The court did

not order any modifications in any of the defendants existing regulations concerning correspondence among civilians and inmates.

A finding of fact is deemed to be clearly erroneous if it is not supported by substantial evidence, if it proceeds from an erroneous conception of applicable law, or if in consideration of the entire record, the reviewing court is left with a definite and confirmed conviction that a mistake has been made. *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504, 1511 (1986); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 855 (1982). Controversial sometimes in its identity when compared to a conclusion of law, the findings of facts are, nevertheless, the building blocks upon which any trial court opinion is based.

It is the traditional view that injunction is a remedy not lightly granted, but is a remedy which needs to be molded by the use of the discretion of the court. *Hect v. Bowles,* 321 U.S. 321 (1944). Since injunctive remedies are not punitive in nature, a court may take into effect the good faith of defendants when it applies its remedy. *Id.* at 325-326. Among the various factors to be proven to and weighed by the court, the plaintiff has to demonstrate whether there is a danger that the complained of conduct will be repeated and that harm will result. *Lewis v. S.S. Baune,* 534 F.2d 1115, 1124 (5th Cir. 1974), *reh. den.,* 545 F.2d 1299 (1974). In the present case, the findings of fact do not support the findings of the court because they were factually irrelevant to the conclusions of law and to the remedy of the court. Although the court made many factual findings concerning the practices of the defendant what at best can be characterized as negligent lapses by the defendant in the application of the then existing correspondence policy the court did not find any pattern or practice on which to rely to finding the defendants' regulation unconstitutional. Nor did the court in

this case order the defendants to change the manner in which it applied correspondence regulation regarding inmates and civilians. Without a finding that the complained of behavior is likely to reoccur, or is of such a continuing nature as to indicate a pattern or practice, an injunction should not be the appropriate remedy. *Rizzo v. Goode,* 423 U.S. 362, 375 (1976). This conclusion is especially compelling if the findings of facts support the court's assessment that the regulations were enforced in an "arbitrary and capricious" manner. *Safley v. Turner,* 589 F. Supp. at 596. That is a due process violation which needs more than a mere finding of negligence. *Daniels v. Williams,* ..... U.S. ....., 106 S.Ct. 662, 665 (1986).

Further, since the court was using an inappropriate standard of review, as argued in the previous two points, these findings of fact cannot help but be skewed by the incorrect perception of the applicable law. See *United States v. Singer Mfg. Co.,* 374 U.S. 174, 193 (1963); *Shull v. Dane, Kalman & Quail, Inc.,* 561 F.2d 152, 155 (8th Cir. 1977).

Without some sort of finding of something more than mere negligence on the part of mailroom employees, the violation of divisional or institutional regulation should not be used as a finding of fact for a division-wide injunction. This is illustrated by the following finding of fact:

> 5. There have been instances where the divisional correspondence regulation has been violated. For example:
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> a. Letters have been stopped without notice or explanation to either the correspondent or the recipient;
>
> b. Mail to and from persons not incarcerated has been stopped or refused on factually incorrect grounds or without legitimate justification;
>
> c. Mail to incarcerated family members has been refused or returned without notification or explanation;
>
> d. Mail with former inmates has been refused or returned without notification or explanation.

Safley v. Turner, supra, 589 F.Supp. at 591.

Theoretically, at Renz and at other mailrooms in institutions in the Division of Corrections, employees were suppose to supply a slip of paper with an appropriate box marked to notify an inmate that his mail had been stopped or some other action had been taken by the staff. As far as can be determined from the testimony of Peggy Collins (Vol. I, Tr. 130), Shirley Lute (Vol. III, Tr. 54), and P. J. Watson (Vol. IV, Tr. 203), some mail was stopped without any formal notice.[7] There was testimony, however, that others in any one of the situations outlined in 5(a) received notices or explanations.[8]

Concerning 5(b), there was testimony that mail from Cheryl Lovell to her nonincarcerated aunt, Alice Garnett, was stopped (Vol. I, Tr. 102). Also, Mannie Collins testified that while he was at another institution, not Renz, he was limited to one letter a day to some of his relatives (Vol. I, Tr. 139-141). Judy Henderson testified that mail from her father had been returned on the incorrect basis

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7. Robert Boessen also testified that he had had four letters stopped without notice, but had never contacted anybody at Renz concerning his belief (Vol. III, Tr. 20, 25). This impression is dissipated by the testimony of the intended recipient of the correspondence, Carlene Borden, who contacted the mailroom and was informed that they had not had any mail from Mr. Boessen, but said they would look for it (Vol. III, Tr. 30).

8. Sharon Lovell (Vol. I, Tr. 102) at various times (Vol. I, Tr. 121-122), Mannie Collins (Vol. I, Tr. 139-141), Loretta Danforth (Vol. I, Tr. 203), Alice Garnett (Vol. II, Tr. 17-18), Nancy Roe (Vol. III, Tr. 45), Shirley Lute (Vol. III, Tr. 53), Joyce Epley Roberts (Vol. III, Tr. 65), Mary Webb (Vol. III, Tr. 88, 91), Judy Henderson (Vol. III, Tr. 185, 1982, 218-219), William Quillium (Vol. III, Tr. 253), Leonard Safley (Vol. IV, Tr. 169), Janet Kamerman (Vol. IV, Tr. 214), and, it is assumed, Diane Finley (Vol. IV, Tr. 221). All received notice when their mail was stopped for any of the various infractions of the mail rule. The defendants have tried to note the instances thoroughly and accurately. If, however, there are unintentional errors, we feel confident that the plaintiff will bring them to the Court's attention.

that it was mistaken for mail from a prison. Finally, Earl Engelbrecht testified that because of racist remarks concerning Superintendent Turner, he had personally returned a letter to an inmate and indicated that she should not make racist comments about the superintendent. He indicated that he had never done that before or since, and it was because of his deep seated aversion to racism (Vol. V, Tr. 105-106). It is assumed that the court based this finding of fact on the fact that Alice Garnett's and Judy Henderson's relatives were not prisoners. As was testified to by Earl Engelbrecht, the manner in which inmates circumvented the mail rule was to send their letters to a civilian who would then change envelopes and send the letter into another prison (Vol. II, Tr. 147). In circumstances when it became apparent that civilians were assisting in the circumvention of the mail rule, the civilian mail was returned. In the present case, the staff could not remember why they had returned the mail from the Henderson family and Alice Garnett, but it was assumed that it was because they believed they were circumventing the rule. Further, inmates Loretta Danforth (Vol. III, Tr. 146-149, 155) and Bill Quillum (Vol. III, Tr. 236) and Len Safley (Vol. IV, Tr. 173) testified that they actively engaged in circumvention of the mail rules. Certainly that indicates that there was evidence to substantiate at least the fear that inmates were circumventing the mail rule was legitimate. The other instance of limiting the number of letters sent or received and the returning of the letter containing the racist comments was probably without legitimate basis. The question becomes whether isolated instances would seem to make this a reckless or malicious practice.

The evidence which substantiated finding 5(c), that mail to incarcerated family members had been refused, seemed to be based on Linda Thompson's testimony that she had been refused permission to write to a sister (Vol. I, Tr. 204). Shirley Lute testified that on occasion, her

son thought that mail was not getting through to her (Vol. III, Tr. 54), but other times that it would. Mary Webb testified that she had been approved to correspond by Mr. Engelbrecht, but that the letter had been returned (Vol. III, Tr. 98). But she never sought out Mr. Engelbrecht to clear up the confusion (Vol. III, Tr. 98).[9]

Finally, correspondence with former inmates was alleged to have been refused without notice. It is difficult to ascertain what testimony the court was relying on in this issue. It seems that Mary Webb testified that letters to a Ronnie Sowers who was on probation from the Renz Correctional Center were returned, but she never testified that she had any mail stopped without notice (Vol. III, Tr. 88, 91). It is possible that the court relied on the testimony of inmates who, during their attempts to get married, wrote to their fiancees on the streets and had letters returned (see Mannie Collins, Vol. I, Tr. 136, 140). This does not seem to be clear, from the record because Linda Thompson and Robert Thompson did not testify to any correspondence problems. Nancy Row indicated that no letters were ever stopped (Vol. III, Tr. 45). Joyce Epley Roberts indicated that no letters had ever been stopped (Vol. III, Tr. 65). Judy Henderson never testified that she had ever had a letter stopped without notice (Vol. III, Tr. 185, 192, 195) and that when she had sought approval to write to a newly released inmate, the request was approved (Vol. III, Tr. 218-219). It is also possible, that he based the finding of fact on Robert Boessen's statement that four of his letters had not gotten through to Carlene Borden (Vol. III Tr. 20). This would seem to conflict with Carlene Borden's testimony that she had contacted the mailroom, and they indicated they

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9. The approval rate for inmate-to-inmate correspondence when they were not related was approximately 25% (Vol. IV, Tr. 259-261). When relatives were involved, it was supposed to be blanket approval (Vol. V, Tr. 47-49).

had not received them. At any rate, it would seem to be an awfully thin broth in which to base a finding of fact which was the basis for striking down a division-wide correspondence policy. It would seem that, at least, this finding is unsupported by substantial evidence.

Although appellants would concede, in the proper deference to the decisions of the lower courts, that some inferences are permissible, this finding of fact takes the scheme too far. Factual findings should not be based on an erroneous conception of the law. *United States v. Singer Mfg. Co., supra,* 374 U.S. at 193; *Shull v. Dain, Kalman & Quail, Inc., supra,* 561 F.2d at 155. It was established that it was the appellants' policy to give notice to inmates whose mail was refused and to permit correspondence between inmates and their friends and family who were incarcerated. Although occasional instances of error may possibly provide a basis for a finding of negligence, they do not, and the court did not find that, these "instances" established a practice or pattern of abuse. There should be more to this finding than a mere showing of negligence, especially when the finding is used to strike down a regulation which covered 8,100 inmates and twelve institutions. In addition, 5(a), (b), and (d), although possibly and only technically relevant to the case as examples of possible violations of *Procunier v. Martinez,* 416 U.S. 396 (1974), they should not be used as evidence of constitutional violation or of an exaggerated response on the distinct issue of inmate-to-inmate correspondence. Frankly, the great majority of the letters which were returned, were returned because inmates were attempting to correspond with other inmates. The court seems to have assumed a constitutional violation before it found the regulation unconstitutional.

The Court also relied on its findings of fact in paragraphs six and eight which indicate that Renz's "more restrictive practice" was set out in the booklet and presented to each inmate upon arrival. Initially, it should be noted that the inmate correspondence regulation established a discretionary standard that non-related inmates *may* correspond with each other. This language leaves the discretion to permit correspondence up to the individual caseworkers. The much maligned orientation booklet given to the inmate on arrival correctly indicated that correspondence was permitted between related inmates. The regulation did not give any protectable constitutional interest to any inmate to correspond with non-related inmates. *Jones v. Mabry,* 723 F.2d 590, 593 (8th Cir. 1983). Thus, it is difficult to understand what is the legal result of having a more restrictive practice at this institution. In addition, Renz had unique problems, different from any other prison in the system. Renz was more restrictive because the department's regulations permitted institutional regulations to be adopted to suit the conditions at the institution (Vol. IV, Tr. 242).

Further, as was explained by the chief caseworker, Earl Engelbrecht, an assessment of best interest is made by reference to custody level, behavior, the potential correspondent, and whether or not the inmate receives visitation (Vol. IV, Tr. 258-260). In fact, there was considerable evidence, even the defendants' witnesses, that indicated that correspondence had been approved for non-related inmates (Vol. III, Tr. 218-219). Mr. Engelbrecht indicated that probably 25% of the requests were approved for non-related inmate-to-inmate correspondence (Vol. IV, Tr. 261). Interestingly enough this percentage was exactly the figure the appellants' expert indicated was the percentage of healthy correspondence in an unregulated situation (Vol. V, Tr. 22).

The Court's conclusion eleven misapplied the regulations of the Department of Corrections and assumed a constitutional violation. In the finding, the District Court found that inmate-to-inmate legal mail was "routinely opened, stopped, or refused in violation of Department

of Corrections' written rule." *Id.* at 591. Actually, this is an incorrect conclusion. A review of the Department of Corrections' rule on inmate-to-inmate legal mail is necessary. Legal mail is defined in the correspondence rule as:

> Letters from judges, courts, elected state and federal officials, officials of confining institutions, division and department administrators, parole board members, attorneys, and media representatives may be delivered to the inmate unopened, based on the return address on the outside of the envelope. Any letter in this privileged category of a suspicious or doubtful nature may be opened and inspected in the presence of the inmate to whom the mail is addressed.

20-118.010(2)(B) (J. Appendix 35).

By definition, the mail sent between inmates does not fall under any category of legal mail, thus, it does not merit automatic privilege. Naturally, since "legal" could be used as a method to circumvent the mail, inmates had to be approved prior to gaining this privilege. Inmates do not have a right to affix the legend "legal" and send a letter unless it was within the protected area. If inmates were corresponding legally, they were permitted to correspond only after they had been approved (Vol. V, Tr. 65-66). The appellants retain the right to review mail even if its subject matter is arguably legal if it does not fall within the protected class of mail and is not clearly designated as such. *Jenson v. Klecker,* 648 F.2d 1179, 1182 (8th Cir. 1981). (*See also,* Vol. V, Tr. 69.) To permit inmates to control the approval process is asking for trouble.

The finding contained in paragraph nine, although having a minimal amount of evidence to support it, is an incorrect basis for a finding that the Department of Corrections' correspondence policy violates the constitutional rights of inmates. Although regrettable, there was evidence that Earl Engelbrecht had personally returned a

letter which contained racist comments about Mr. Turner. This finding highlights the frailty of the findings of fact in this case. This finding of fact is material to the issue of what restrictions inmates should be on inmate-to-inmate correspondence. There were no damages found, nor any claims that the civilian-to-inmate correspondence policy was in any way constitutionally infirmed. What this finding does demonstrate is that even with a "constitutional" regulation, employees are going to make mistakes. Further, it would seem that Mr. Engelbrecht's mistake is an issue best resolved in another lawsuit; it should not be used to substantiate the restrictions under which inmates should be able to correspond with each other.

The Court found that correspondence with inmates had been denied solely on the basis of inmate marital status and had been denied despite "evidence" that the correspondence was a desire simply to maintain a wholesome friendship. This finding completely ignored the unrefuted evidence by the appellants' witnesses. The friction that is caused as a result of a "love triangle" and the maintenance of "wholesome" inmate friendship is the basis for a large amount of violence within the prison system (Vol. V, Tr. 12-14). There is no basis in testimony for this assertion. In fact, the friendships that are developed in prisons are, on the whole, not wholesome (Vol. III, Tr. 164). Although we would all like it to be otherwise, the evidence is that inmates do not have a good effect on each other.

Concerning finding number thirteen, it should be noted that, under the limited controls exercised under the regulation, the employees at Renz have been able to control the outgoing and incoming mail. There was a great amount of unrefuted testimony, however, which indicated that an increase in correspondence would mean that the employees would have to forego the scanning of each piece of inmate-to-inmate mail and only scan selected pieces (Vol. IV, Tr. 78, 108). This is the procedure in the Kansas

system, and it was implicated as actually having contributed to an escape (Vol. III, Tr. 158-160). It seems fundamentally incongruous to have a finding of fact that inmate-to-inmate correspondence could be controlled when the testimony was absolutely contradictory (Vol. IV, Tr. 42).

It is the position of the appellants that the findings of fact which support the court's opinion concerning inmate-to-inmate marriages are unsupported by the record and are insufficient to support the conclusion that the regulation of the Department of Corrections violates inmates' rights. The findings numbered fifteen through twenty-one in which the court finds the support for its legal opinions are based on an incorrect review of the record and on an incorrect assumption of the applicable law.

Superintendent Turner made decisions to disapprove marriage requests for more important reasons than a "protective" attitude. Inmates Watson's and Henderson's requests were denied because of concerns for security. Row, Thompson, Roberts and Finley had their requests denied for the mixed reasons of security and rehabilitation. The Court did not challenge the good faith, sincerity or even legitimacy of any of these decisions, it merely would have made a different decision.

Illustrative of the faulty premises on which the Trial Court based its finding is the notion that the Court *can* substitute its judgment for the judgment of the prison officials even on "tactical matters" if there is arguably a less restrictive alternative to be used (Vol. IV, Tr. 27-28).

CONCLUSION

In conclusion, the Courts below were in error when they rendered their decisions. The judgment should be reversed and the injunction dissolved.